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Supreme Court of the United States

OCTOBER TERM, 1930.

NO. 687.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 688.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 689.

CUMBERLAND COAL COMPANY, Petitioner,
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BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

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CUMBERLAND COAL COMPANY, Petitioner,
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BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 691.

HENRY A. PHILLIPS, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 692.

PIEDMONT COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 693.

GREENE COUNTY COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

On Writs of Certiorari to the Supreme Court of the State of Pennsylvania.

MOTION OF RESPONDENT TO DISMISS AND QUASH THE WRIT OF CERTIORARI AND TO AFFIRM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF GREENE COUNTY AND THE SUPREME COURT OF PENNSYLVANIA.

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On Writs of Certiorari to the Supreme Court of the State of Pennsylvania.

MOTION TO DISMISS AND AFFIRM.

Now come J. N. Scott, Otis H. Headley and Paul Debolt, County Commissioners of Greene County, Pennsylvania, by Challen W. Waychoff, A. A. Purman and Ambrose Bradley, their counsel, and moves this court to dismiss and quash the paper purporting to be a writ of

certiorari herein for want of jurisdiction in this court to grant the same and because the paper purporting to be a writ of certiorari is informal, irregular and insufficient and in support of said motion assign the following reasons:

FIRST. Because the Federal question set up in the petition for the writ of certiorari, and because of which the writ was granted, was neither set up in nor adjudicated by the Court of Common Pleas of Greene County, Pennsylvania, in which court these appeals were first heard.

SECOND. Because the Federal question presented in the petition for writ of certiorari, and because of which the writ was granted, does not have a basis in the record of these appeals in the Supreme Court of Pennsylvania, because of lack of assignment of error therein showing the proper presentation of a Federal question to that court.

THIRD. Because petitioners did not at the proper time and in the proper manner specially set up or claim some title, right, privilege or immunity under the Constitution or laws of the United States, and that the decision of the highest court of the state in which a decision could be had was against the title, right, privilege or immunity so set up or claimed.

FOURTH. Because the claim of a violation of a Federal right was not set up in accordance with Pennsylvania practice. Said claim being first advanced in the Appellate Court by the petition for reargument after final decision whereas the uniform practice of the appellate courts of Pennsylvania is to disregard question not presented to the lower court.

FIFTH. Because the Federal question now raised was not considered nor adjudicated by the Supreme

Court of Pennsylvania as shown by the refusal of the petition for reargument which was presented for the express purpose of having the Federal question considered and decided.

SIXTH. Because the assessments in question were sustained by the Pennsylvania courts on adequate state grounds, that is, a uniform plan of assessment and ratio of assessed to actual value was regularly adopted by the taxing authorities and was applied generally to all taxable property in the county, including petitioners property.

SEVENTH. Because the plan of tax assessment is not properly before this court. The only question in each appeal is whether or not one assessment as made by the taxing authorities of the county is discriminatory, unjust, unequitable and lacking in uniformity. Petitioners entirely disregard this real question involved and seek to have this court pass upon the plan of assessment in Greene County without showing any discrimination against them thereby.

And respondent also moves this court to affirm the judgments of the Court of Common Pleas of Greene County and the Supreme Court of Pennsylvania herein upon the ground that it is manifest that the paper purporting to be a writ of certiorari herein was taken for delay only and that the question upon which it is claimed that the jurisdiction of this court depends is frivolous.

CHALLEN W. WAYCHOFF,

A. A. PURMAN,

AMBROSE BRADLEY,

Counsel for Respondents.

COUNTER STATEMENT OF THE CASE.

The assessors throughout the various townships of Greene County, Pennsylvania, in the triennial assessment of 1928 valued all taxable property at what they considered to be the actual value thereof and at such rates and prices for which the same would separately bona fide sell and assessed the same at a ratio of fifty per cent of assessed to actual value.

> The assessors in Cumberland township and throughout the County of Greene did not assess land of any character, farm lands, dwelling houses, business property or coal at its actual selling value or actual market value or at the actual price or sum which lands would bring at public sale after full public notice, but they did attempt to assess all lands at a ratio of fifty per cent of its actual value limited and defined by market value, throughout the county and in the township of Cumberland. (Finding of Fact 18, R. 293).

Appellants in the court below did not except to this finding of fact, nor was it assigned as error in the Supreme Court of Pennsylvania, which court by opinion filed found that such ratio had been uniformly fixed:

> The fifty per cent ratio throughout the county having been uniformly fixed * * * (R. 604).

The Board of Revision carefully examined and corrected the valuations of all taxable property as returned by the assessors of the various townships and adopted the same ratio of assessed to actual value.

> No minute of their adoption of the fifty per cent ratio was made, but it was actually used by the Board of Revision in making the assessment in this case. (Finding of Fact 20, R. 294).

Appellants in the court below did not except to this finding of fact, nor is it assigned as error in the Supreme Court of Pennsylvania, which finding the Supreme Court of Pennsylvania sustained. (R. 604).

Petitioners appealed from the action of the Board of Revision.

4. Your petitioner avers that said assessment is unjust and inequitable for the following reasons:

(a) Said Assessors and Commissioners have discriminated against your petitioner in favor of the owners of other classes of taxable property within said county by assessing the coal of your petitioner at a higher relative rate than the other classes of real estate are assessed, and as a result the said coal of your petitioner will be required to pay an unjust, unfair and undue proportion of the taxes levied and assessed by the Commissioners of said County and by the School Directors and Supervisors of said Township.

(b) The valuation placed upon said coal of your petitioner is unjust, inequitable, discriminatory and lacks uniformity, as the said Commissioners have assessed all coal in the same township (except what is termed "active coal") at the same valuation, regardless of the remoteness or accessibility of the said coal to market, cost of operation, or means of transportation and regardless of the difference in value and without due regard to the valuation and assessment of other coal and other classes of real estate in the County of Greene (R. 5-6).

At the hearing of these seven appeals in the trial court no testimony was offered by petitioners to show that

the assessments as made, and from which they appealed and of which they now complain, were in excess of the uniform and standard ratio adopted and applied generally throughout the entire county, that is, fifty per cent of the fair market value of their property.

Petitioners relied wholly upon testimony by which they sought to prove that two other tracts of coal in Cumberland Township were assessed below the uniform and standard ratio adopted and applied generally throughout the county. Petitioners relied wholly upon a comparison of their assessments with the assessments of the coal of Buckeye Coal Company and Crucible Fuel Company located in Cumberland township and petitioners did not then, and do not now, assert that the assessments of their property is higher than the uniform and standard ratio of fifty per cent of assessed to actual value as adopted and applied generally throughout the county.

Respondents deny that:

> The question presented in these seven cases is whether the plan of assessment of coal property for taxation pursued by the Commissioners of Greene County, Pennsylvania, sitting as a Board of Revision is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. (Brief for petitioners, p. 3).

On the contrary respondents assert, and the record of the seven cases in the Pennsylvania courts conclusively show, that the only question for decision in each case in this court is:

Is the assessments of petitioners' coal in excess of the uniform and standard ratio of fifty per cent of assessed to actual value adopted and applied generally by the Board of Revision throughout Greene County?

ARGUMENT.

POINT I.

JURISDICTION.

The petitioners failed specially to set up or claim in the Pennsylvania courts any title, right, privilege or immunity under the Constitution of the United States or under any Federal Statute within the requirements of Section 237 of the Judicial Code, and this Court is without jurisdiction to entertain the present petition.

The record does not show the assertion of a Federal right in either the Court of Common Pleas, in which court the actions were instituted, or in the Supreme Court, the highest court of the State of Pennsylvania in which a decision could be had, and to which petitioners' appeals were taken. By opinion filed the Supreme Court decided adversely to petitioners without any mention of the Federal question.

Petitioners' attempt to raise a Federal question first appears in the petition for reargument in the Supreme Court of Pennsylvania, which petition was refused on December 8, 1930, without mention of the Federal question.

The Federal question first comes into the order refusing reargument in the *per curiam* modified order of December 16, 1930, which order was made without notice to respondent and without argument and apparently at the suggestion of petitioners for the express purpose of obtaining the writs of certiorari.

Therefore, under the decisions of this court, to which reference is hereafter made, the alleged Federal right was not specially set up or pleaded at the proper time and in the proper manner and petitioners have not brought themselves within the conditions or the provisions laid down and required by Section 237 of the Judicial Code as interpreted by this court.

As hereinbefore stated the alleged Federal question first appears in the petition for reargument in which petitioners claim that "the plan of assessment in these cases violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States."

To contrast this claim with the record in the Court of Common Pleas and in the Supreme Court lends emphasis to the failure of the petitioners to specially set up or claim their alleged rights in either of those courts.

Petitioners attempted to do by the petition for reargument in the Supreme Court what they should have done below and what would have secured for them a consideration of the now interjected Federal question in both courts below.

Petitioners appeals were presented to the Supreme Court on the record of the appeals from the Common Pleas in which record the Federal question now interjected did not appear.

The decisions of this court on the interpretation of the provisions of sections 237 of the Judicial Code, and similar or equivalent sections in earlier statutes, providing for a review where the aggrieved party shows that he has *"specially set up or claimed"* some *"title, right, privilege or immunity"* under treaties or statutes

of the United States, are so many and the rules are so well settled that it seems unnecessary either to discuss them in detail or to cite any number of decisions to support them.

The following propositions are, we think established beyond the possibility of attack by decisions of this court.

1. The title, right, privilege or immunity must be specially set up or claimed in the state courts in order to give this court jurisdiction in contradistinction to the rule that constitutional questions are sufficiently raised if they are "drawn in question", that is, were actually presented to and necessarily involved in the decision of the state court.

2. It must appear clearly from the record that the state court was advised that a specific Federal right was asserted.

3. The claim must be set up in accordance with state practice and is too late if first advanced in the appellate court when the practice in the state permits that court to disregard questions not properly presented in the lower court.

4. Petitioners claim of Federal right not having been set up in the Common Pleas or in the Supreme Court before final judgment such claim, coming as it does in the petition for reargument in the Supreme Court, comes too late to be considered by this court.

5. For the purpose of determining the jurisdiction of this court the petition for reargument in the Appellate Court, the petition for ceriorari to this court and the argument of counsel form no part of the record.

Sayward v. Denny, 158 U. S. 180.

There is nothing in the record of these cases which shows that petitioners made any claim of Federal right in the trial court or in the Supreme Court of Pennsylvania until after final judgment, or that said claim of Federal right was considered or adjudicated by the Supreme Court.

This court in *Fiss v. St. Louis,* 165 U. S. 273, Mr. Justice Harlan delivering the opinion, held:

> We held at the present term in *Chicago & Northwestern Railway v. Chicago,* 164 U. S. 454, 457, as had frequently before been adjudged, that this court could not review the final judgment of the highest court of the State, alleged to have denied a right protected by the Constitution of the United States, unless such right was specially set up or claimed in the state court by the party against whom the judgment was rendered. Rev. Stat. § 709.
>
> It is contended on this writ of error that the judgment below deprived the plaintiff in error of her property without due process of law, and that this result was accomplished by applying to the case a certain statute of limitations of Missouri as construed and enforced by the highest court of that State.
>
> Upon inspecting the record, we find that no Federal right was set up or claimed, in any form, until after the final decision of the case by the Supreme Court of Missouri, and then by a petition for rehearing. That petition was overruled by that court without any determination of the alleged Federal question, indeed without any allusion to it. The claim of a Federal right came too late, so far as the revisory power of this court is concerned. *Loeber*

v. Schroeder, 149 U. S. 580, 585; *Sayward v. Denny,* 158 U. S. 180, 183."

* * * * * * * *

In *El Paso & Southwestern R. R. Co. v. Eichel & Weikel,* 226 U. S. 590, the syllabus in part reads:

> This court cannot review a judgment of the State court under sec. 709, Rev. Stat., on the ground of denial of a Federal right, privilege or immunity unless the same was specially set up or claimed in the state court.

This action was brought by defendants in error in the district court of El Paso County, Texas, to recover damages for certain alleged breaches of contract committed by the railroad company. Damages were recovered and the judgment awarding them affirmed by the Court of Civil Appeals. The Supreme Court of Texas denied a petition for writ of error to review the judgment in that court and a writ of error was then sued out under section 709, Rev. Stat. to review the judgment of the court of Civil Appeals.

Mr. Justice Pitney, in the opinion (page 598), said:

> After the denial by the latter court (Court of Civil Appeals), of a motion for rehearing, application was made to the Supreme Court of Texas for a writ of error, to the end that that court might review the judgment. In this application alleged Federal rights were for the first time asserted, it being assigned for error that the trial court and the Court of Civil Appeals had "refused to give full faith and credit to the public acts and laws of the territory of New Mexico," etc., etc. The application was considered and refused and a motion for a rehearing thereon was overruled. But since the Court of Civil Appeals is the highest court of the

state that rendered a judgment reviewable here (*Stanley v. Schwalby,* 162 U. S. 255, 269; *Bacon v. Texas,* 163 U. S. 207, 215) the assertion of Federal rights in an unsuccessful application to the Supreme Court of the State for a writ of error raises no question that is reviewable in this court. Writ of Error dismissed.

An attempt to raise a Federal question appearing first in an application to the Supreme Court for rehearing comes too late.

Bilby et al. v. Stewart et al., 246 U. S. 255.

Where the ground presented in a petition for certiorari, and because of which a writ is granted, prove to have no substantial basis in the record because of lack of assignment of error therein showing the proper presentation of a Federal question to the Appellate Court, the writ will be dismissed.

Ellison et al. v. Koswig, 276 U. S. 598.

This case was a certiorari from this court to the Superior Court of Pennsylvania and, hence, it deals with Pennsylvania practice.

Other cases cited in the opinion:

Missouri Pacific R. R. Co. v. Hanna, 266 U. S. 184;

Chicago I. & L. Ry. Co. v. McGuire, 196 U. S. 128;

El Paso & Southwestern R. R. Co. v. Eichel, supra.

In *Capital City Dairy Co. v. Ohio,* 183 U. S. 238, it was held that this court on error to a state court cannot consider an alleged Federal question, when it appears

that the Federal right thus relied upon had not been by adequate specifications, called to the attention of the state court and had not been considered by it, it not being necessarily involved in the determination of the cause.

After these appeals had been disposed of by the Supreme Court of Pennsylvania, petitioners conceived and for the first time asserted in a petition to that court for reargument a Federal question: "That the plan of assessment in this case violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States" (R. 615).

The Supreme Court on December 8, 1930, without reference to the Federal question appearing in the petition for reargument, refused reargument (R. 620).

Eight days later, and after the Supreme Court had adjourned, petitioners without notice to respondents obtained the modified order of December 8, 1930 (R. 620), for the express purpose of obtaining these writs of certiorari.

The net result of all this seems to be that petitioners failed wholly to specially set up or claim relief under any Federal Statute or to set up or claim the violation of any constitutional provision in either of the Pennsylvania courts until it was too late to make or assert such claim.

The trend of the decided cases in this court is, that the party claiming to be aggrieved must specially call his alleged Federal right to the attenion of the state courts. This rule has been adopted by this court in many cases, too numerous for citation, and this rule applies in this case.

Petitioners did not comply with the requirements of Pennsylvania practice which this court has said is a prerequisite to the allowance of an appeal. Had petitioners informed this court at the time the writs of certiorari were awarded that the requirements of Pennsylvania practice had not been complied with it is extremely doubtful that the writs would have been allowed.

POINT II.

The Supreme Court of Pennsylvania did not consider or adjudicate the Federal question on the petition for reargument as required by this Court.

An inspection of the record shows that the Federal question was first raised in the petition to the Supreme Court of Pennsylvania for reargument which petition was presented to that court on December 2, 1930, and reargument refused by that court on December 8, 1930, and while that court was in session. The *per curiam* modified order of the Supreme Court of Pennsylvania, was made December 16, 1930, and after that court had adjourned.

The modified order of December 16, 1930, reads as follows:

> And now, December 16, 1930, the order of December 8, 1930, is modified to read as follows: Upon consideration of the petition for reargument, the court being of opinion that the plan of assessment in these cases does not violate the equal protection clause of the fourteenth amendment to the Constitution of the United States, reargument is refused.
>
> PER CURIAM.

In *Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, Mr. Justice Lurton in delivering the opinion of this court (p. 333), said:

> No question of the impairment of the obligation of a contract was decided in the trial court nor in the Supreme Court, nor is any such question assigned as error here, nor presented in argument. Upon a petition for a rehearing filed in the Supreme Court one of several grounds stated was, that a decree taking the land in question without compensation for the improvements thereon would be "a taking without due process of law in violation not only of the constitution of Virginia, but of the Fourteenth Amendment to the Constitution of the United States." This application was refused, without opinion, the judgment entry being in these words:
>
> "The court having maturely considered the petition aforesaid, the same is denied."
>
> The words "maturely considered" do not import any decision of the question made. Just such an entry has been held to be no more than a refusal to rehear the case: *Forbes v. State Council,* 216 U. S. 396.
>
> Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort. If, however, the state court actually entertains the petition and decides the Federal question, and this appears by the record, the requirement of § 709 that the right shall be specially set up and denied is complied with. *McCorquodale v. Texas,* 211 U. S. 432; *Mallett v. North Carolina,* 181 U. S. 589; *McMillen v. Mining Company,* 197 U. S. 343, 347.

Having neglected to raise any Federal question before the final judgment in the State Supreme Court, and having failed to obtain a rehearing that the question might thereby be raised and a decision obtained upon it, the plaintiffs, in error have endeavored to show that in fact the Supreme Court of Virginia did rehear the case upon their petition and did decide the Federal question, therein for the first time raised, adversely, by obtaining the certificate of the Chief Justice of the court, months after the court had handed down its final opinion, that the court, "refused the said petition for a rehearing on the ground *inter alia* that the decree or decision of this court * * * did not constitute a taking of the property of the defendants in error without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that the said defendants in error were not thereby deprived of any rights under said Amendment." This certificate was never made the order of the court and a part of the record, as in *Marvin v. Trout,* 199 U. S. 212, where it was held "perhaps sufficient" to show what Federal question was decided in a case where no opinion was filed. But that such a certificate can do no more than make more definite and certain that which otherwise may be insufficiently shown by the record proper is the settled rule of this court. That in itself it cannot confer jurisdiction is too plain for controversy. *Seaboard Air Line v. Duvall,* 255 U. S. 477; *Home for Incurables v. New York,* 187 U. S. 155. At the utmost it may aid to the understanding of the record. *Gulf & Ship Island Railway v. Hewes,* 183 U. S. 66.

For the reasons stated, the writ of error must be dismissed.

In *McCorquodale v. Texas,* 211 U. S. 432, the syllabus reads:

> "It is too late to raise the Federal question for the first time in petition for rehearing in the state court of last resort, unless, and it must so appear, that court actually entertains the motion and passes upon the Federal question; where the order is merely a denial of the motion the writ of error will be dismissed."

Mr. Justice McKenna in delivering the opinion of the court (p. 436-7), said:

> The order of the court on the motion for a rehearing was as follows:
>
> "This cause came on to be heard on appellant's motion for a rehearing, and the same considered by the court said motion is overruled."
>
> This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State after that court has pronounced its final decision. *Loeber v. Schroeder,* 149 U. S. 580, 585; *Pim v. St. Louis,* 163 U. S. 273. It is true that we have also decided that if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. *Mallet v. North Carolina,* 181 U. S. 589; *Leigh v. Green,* 193 U. S. 79; *Corkran Oil Co. v. Arnaudet,* 199 U. S. 182, 193; *Fullerton v. Texas,* 196 U. S. 192; *McMillen v. Ferrum,* 197 U. S. 343. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than a denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion.

In *Forbes v. State Council, etc.*, 216 U. S. 396, Mr. Justice Day in delivering the opinion (p. 398-9) said:

> In passing upon the petition for rehearing the Supreme Court of Appeals of Virginia said: "On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on January 16, 1908, and to grant a rehearing of said cause, the prayer of said petition is denied."
>
> It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. *Loeber v. Schroeder*, 149 U. S. 580, 585; *Pim v. St. Louis*, 165 U. S. 273.
>
> There is an exceptoin to this rule when it appears that the court below entertained the motion for rehearing, and passed upon the Federal question. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies. *Mallett v. North Carolina*, 181 U. S. 589; *Leigh v. Green*, 193 U. S. 79; *Corkran Oil Co. v. Arnaudet*, 199 U. S. 182; *McMillen v. Ferrum*, 197 U. S. 343; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 118.
>
> But it is alleged, the memorandum which we have quoted shows that the Virginia court must have considered and passed upon the Federal question made in the petition for a rehearing. Except that the order is said to be upon "mature" consideration, it is almost word for word the order on rehearing reviewed in *McCorquodale v. Texas*, 211 U. S. 432, which was held to amount to no more than a denial of the motion. See 211 U. S. 437. In that case the rule was again laid down that it was too late to raise a Federal question upon a petition for

rehearing unless the Federal question was passed upon in ruling upon the petition.

It results that the writ of error in this case must be dismissed.

In the case at bar, the Supreme Court of Pennsylvania having adjourned on December 5, 1930, the order of December 8, 1930, refusing reargument was made by the court while in session at which session the Federal question was not considered in so far as the record shows. Then on December 16, 1930, after the Supreme Court had adjourned the *per curiam* modified order was made, but in that order the Federal question raised in the motion for rehearing was not in fact passed upon by the court and the modified order is nothing more than a denial of the motion and the word used in the modified order expresses no more than would be implied from a simple denial of the motion, and, hence, the general rule as laid down by this court, that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late, must prevail.

POINT III.

Error not assigned is not open to review in the Supreme Court of Pennsylvania.

Rule 50 of the Rules of the Supreme Court of Pennsylvania provides:

> The statement of the question involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind, and whenever possible, each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court

below. If a qualified answer was given to the question, appellant shall indicate, most briefly, the nature of the qualification; or if the question was not answered and the record shows the reason for such failure, the reason shall be stated briefly in each instance without quoting the court below. The questions and answers in their entirety should not ordinarily exceed twenty lines, must never exceed one page, and must always be printed in type at least as large as point 10, on the first page of the Brief, without any other matter appearing thereon. This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not thus set forth in or necessarily suggested by the statement of questions involved.

In compliance with the requirements of the above rule appellants in their brief filed in the appeals, stated the questions involved therein as follows:

1. May Township Assessors and County Commissioners sitting as a Board of Revision, lawfully assess all bituminous coal in the Pittsburgh or river vein within the territorial limits of a township at the same value, disregarding differences in actual or market values by reason of great differences of distance from the river or rail transportation and other factors entering into values, where it is undisputed that the actual or market value of the coal varies throughout the township and that the coal fronting on the river and railroads possesses a value twice that of the coal lying back from the river and extending to a distance of 9 or 10 miles?

   The Court approved this assessment.

2. May Township Assessors and County Commissioners sitting as a Board of Revision, lawfully refuse to allow the owner of coal alone a deduction of six per cent (6%) from the acreage, where they allow such deduction to the person or corporation owning both coal and surface or surface alone?

   The Court approved this disallowance.

In addition to this rule the practice in the Supreme Court of Pennsylvania as relates to assignments of error is well settled. Every error must be specifically pointed out in the assignments of error and error not assigned is not open to review and this court will recognize and be governed by the rules of practice in a state court prescribing the requirements to be observed in order to save a question for review in that court.

In *Consolidated Cigar Corp. v. Corbin,* 285 Pa. 273, defendant failed to call attention of the court to the fact that the transaction involved was interstate in character and that a foreign corporation might carry on a single transaction of that nature and be protected by the Federal Constitution from the ordinary consequences of its failure to register in Pennsylvania. Defendants first asserted that phase of the issue on their appeal to the Supreme Court. That court held that "* * * this contention should have been made to the court below * * * and not to this court as an original contention". Citing certain Pennsylvania and decisions of this court (p. 281). "Where facts are present in the record on which a constitutional question * * * is sought to be based but the question was neither raised in or passed on by the court below, it will not be considered on appeal by this court" (p. 281).

The court then quotes from *Central Union Telephone Co. v. City of Edwardsville,* 46 Pa. Sup. Ct. 90, 91, a decision of this court, *Hulbert v. Chicago,* 202 U. S. 275, 280, as follows:

> "Without any doubt it rests upon each state to prescribe the jurisdiction of its appellate courts * * * and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable where Federal rights are in controversy then when the case turns entirely upon questions of local or general law".

Other Pennsylvania cases:

> *Clarion Borough Petition,* 275 Pa. 175;
> *Hart v. Fuller Canneries Co.,* 263 Pa. 238;
> *Chartiers Creek Bridge,* 235 Pa. 365.

The constitutional question now interjected into these cases was not raised in, called to the attention of, passed upon, or decided by the Court of Common Pleas. Neither was such question stated as being involved in the appeals to the Supreme Court nor was it raised therein by assignment of error or argued in the Supreme Court of Pennsylvania.

This court has repeatedly said that its jurisdiction to review the final judgment of the highest court of a state under Section 237 of the Judicial Code when there is claimed in it any title, right, privilege or immunity under the Constitution of the United States and the decision is either in favor of or against the title, right, privilege or immunity specially set up or claimed under the constitution that such claim must be asserted at the proper time and in the proper manner by pleading, mo-

tion or other appropriate action under the state system of pleading and practice. And upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court when it is clear that such decision was not rendered in a spirit of evasion for the purpose of defeating the claim of Federal right.

No Federal question appearing before the trial court nor in the record of the appeals to the Supreme Court the adverse decision of both lower courts could, by no stretch of the imagination have been rendered in a spirit of evasion for the purpose of defeating the claim of Federal right.

Hulbert v. Chicago, 202 U. S. 275;
Willoughby v. Chicago, 235 U. S. 45;
Keokuk Bridge Co. v. Illinois, 175 U. S. 626.

A Federal question which will sustain a writ of error from the Federal Supreme Court to a state court cannot be first raised in the assignment of error in the Federal Court.

Matters v. Commercial Loan & T. Co., 216 U. S. 613.

The assignment of errors in the Federal Supreme Court cannot raise a Federal question reviewable on writ of error to a state court, but such review is confined to the assignments of error made and passed upon in the judgment brought up for review.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 112.

CONCLUSION.

The writs of certiorari should be dismissed, or, in the alternative, the judgment of the Pennsylvania Court should be affirmed.

Respectfully submitted,

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